LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court,
FILED
FEB 28 196
JOHN F. DAVIS, CLE

In The
Supreme Court Of The United States

October Term, 1967

1168

ROGER F. COTE, *Petitioner,*

v.

THE STATE OF NEW HAMPSHIRE, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW HAMPSHIRE

Respectfully submitted,

John W. King
David L. Nixon,
Counsel for the Petitioner

KING, NIXON, CHRISTY & TESSIER
489 Canal Street
Manchester, New Hampshire 03101

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes and Constitutional provisions involved	3
Statement	3
Reasons for granting the writ	12
Conclusion	16
Appendix A—Opinion and judgment below	18
B—Revised Statutes Annotated of New Hampshire, Chapter 516, Section 33	26
C—Defendant Roger F. Cote's Motion For Continuance Pending Disposition Of Cases Involving Identical Or Similar Issues Of Law In United States Supreme Court, and Order thereon	27

CITATIONS

CASES:

Baker v. *Hudspeth*, 129 F. 2d 779	17
Burgett v. *Texas*, 389 U. S. 109	12
Estes v. *Texas*, 381 U. S. 532	13
Gordon v. *U. S.*, 383 F. 2d 936	14, 15
Krulewitch v. *U. S.*, 336 U. S. 440	16
Luck v. *U. S.*, 348 F. 2d 763	14
Nash v. *U. S.*, 54 F. 2d 1006	16
Sheppard v. *Maxwell*, 384 U. S. 333	13
Spencer v. *Texas*, 385 U. S. 554	12
State v. *Lapage*, 57 N. H. 245, 24 A. 69	13, 14

Page

State v. *Roger F. Cote*, 108 N. H. (October 31, 1967) 1

U. S. v. *Banmiller*, 310 F. 2d 720, *cert. den.*, 375 U. S. 828.... 16

U. S. v. *Jacangelo*, 281 F. 2d 574 16

STATUTES:

Canal Zone Code, *s.* 2825 14

Kansas Laws, 163, *c.* 203; K. S. A. 60-421 14

N. H. Laws, 1871, Ch. 38, Sec. 1 ..... 3, 14

28 U. S. C., Section 1257 (3) 2

United States Constitution,

Fifth Amendment 3, 13

Sixth Amendment 3, 13

Fourteenth Amendment 3, 13

Virgin Islands Code, *s.* 835 14

MISCELLANEOUS:

Bentham, *Rationale Of Judicial Evidence, b.* IX, *pt.* III, *c.* III (Bowing's ed. vol. VII, *pp.* 406 ff.) (1827) 14

California Law Revision Commission, "Reports, Recommendations And Solutions", Vol. 7, *pp.* 141-144 (1965) 14

Daniel, "Fair Trial And Freedom Of The Press", 71 Case And Comment, No. 5 (1966) 13

Kalven & Zeisel, *The American Jury* (1966) 15

Model Code Of Evidence, Rule 106 (1942) 14

Uniform Rules Of Evidence, Rule 21, 9A Uniform Laws Annotated (1965) 14

II Wigmore, *Evidence* (3d Ed.) *s.* 519 (1940) 14

Comment, 70 Yale L. J. 763 (1961) 16

In The
Supreme Court Of The United States

October Term, 1967

ROGER F. COTE, *Petitioner*,

v.

THE STATE OF NEW HAMPSHIRE, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW HAMPSHIRE

Roger F. Cote respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of New Hampshire in the above-entitled case entered on October 31, 1967.

CITATION TO OPINION BELOW

The full opinion of the New Hampshire Supreme Court in Case No. 5579, State of New Hampshire v. Roger F. Cote is printed in Appendix A hereto, *infra, p.* 18. The Motion For Rehearing filed on behalf of Roger F. Cote, and the Court's ruling thereon, together with a Supplementary Motion For Rehearing and a Motion To Supplement Record filed on behalf of Roger F. Cote, and the rulings of the Court thereon, are contained in the record certified by the Clerk of the Supreme Court of New Hampshire.

JURISDICTION

The original judgment of the Supreme Court of New Hamp-

shire was entered on October 31, 1967. The Motion For Rehearing, filed pursuant to Rule 10 of the Rules Of The Supreme Court of New Hampshire, was denied on December 5, 1967. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1257 (3), "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court . . . (3) By writ of certiorari, where the validity of a . . . State statute is drawn in question on the ground of its being repugnant to the Constitution . . . of the United States, or where any title, right, priviledge or immunity is specially set up or claimed under the Constitution . . . of . . . the United States".

QUESTIONS PRESENTED

I. Whether a defendant in a state criminal case can possibly receive a fair trial by an impartial jury, and due process of law, when, upon his taking the witness stand the State is allowed to cross-examine him, ostensibly on grounds of credibility, as to his entire record of prior criminal convictions, irrespective of their nature, degree, remoteness in time, logical relevance to the issue of credibility, or whether he was represented by counsel as to such convictions, and unprotected by meaningful instructions at the time of the subject cross-examination or in the Court's charge to the jury as to the supposedly-limited purposes of such cross-examination.

II. Whether a defendant in a state criminal case can possibly receive a fair trial by an impartial jury, and due process of law, when the State is permitted, by inference and innuendo, to indicate to the jury (1) that the defendant participated at the time of the alleged subject offense, in offenses other than that with which he was charged, (2) that he was less that honest with the police in that he refused to answer questions in the absence of counsel at the time he was apprehended, (3) that his record of prior convictions was more extensive than was the fact, and (4) that the nature of the defendant's prior convictions was such as to indicate *guilt*, rather than only lack of credibility, as to the offense for which he is being tried.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The statutory provisions involved are Chapter 516, Section 33, of the Revised Statutes Annotated of New Hampshire (Laws, 1871, Chapter 38, Section 1) which is printed in Appendix B, *infra, p.* 26, and the Fifth ("No person shall be . . . deprived of life, liberty, or property, without due process of law"), Sixth ("the accused shall enjoy the right to a speedy and public trial by an impartial jury . . . and to have the assistance of counsel for his defense"), and Fourteenth ("No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.") Amendments to the Constitution of the United States.

STATEMENT

Commencing on April 26, 1966, Roger F. Cote was tried by jury in the Hillsborough County Superior Court under an indictment alleging that on April 19, 1965, he had committed the offense of breaking, entering and larceny. No witness or other direct evidence of any kind was offered at trial establishing that Cote had broken into the subject home, been inside it, or participated in the taking of any article therefrom. It was unquestioned that Cote had had access to the car utilized in the offense before the fact, but he had been drinking various beverages, including double bourbons and soda, screwdrivers, and beer (R. 141-143), for a period of approximately three hours prior to the time when the offense was committed. He had accompanied another person, who had asked to borrow the car, and who drove it that day, and Cote was observed in a slumped position in the passenger seat of the car, "as if sleeping" by a witness for the State on the same street where the subject offense was committed, at a time proximate to its commission. (R.12). During the two-day trial Cote took the stand and testified that he had gotten drunk during the morning of the day in question, immediately following his release from a 27-day confinement in the Hillsborough County Prison Farm for drunkenness (R. 166), loaned the subject car

keys to one Enright, at the latter's request accompanied Enright in the car "because it was not my car, and I figured that if I went along that it would be all right" (R. 161), and had fallen asleep until later awakened by Enright's efforts to free the car from a sandpit where it had become stuck. (R. 139-181).

During the State's cross-examination of Cote, the following colloquy took place (R. 161-165):

"Q. Now, who drove the car?

A. Mr. Enright.

Q. You did not drive it?

A. No, sir.

Q. And did you say something about he wanted to go and see his girl friend?

A. Yes, sir.

Q. Which girl friend was this?

A. He did not name any names, sir.

Q. As far as you knew, you are telling this jury right now that that is the only thing he told you he wanted the car for?

A. Yes, sir.

Q. And you, sir, were going to go out and go with him when he went to see his girl friend, is that it?

A. Yes, sir.

Q. That is the only purpose you went for?

A. Well, I went along because it was not my car and I figured if I went along that it would be all right.

Q. Sir, on November 4, 1950, were you convicted in this Court of the crime of breaking and entering and larceny?

Mr. NIXON. My objection to any line of questioning of this nature

The COURT. Do you wish to state the ground of your objection?

Mr. NIXON. In that it does not bear upon anything having to do with this particular case, and I submit it is a violation of my client's constitutional rights.

The COURT. For what purpose do you offer it?

Mr. BUSSIERE Credibility, Your Honor.

The COURT. For that purpose you may proceed.

Mr. NIXON. Note my exception, please.

The COURT. Exception noted.

Mr. NIXON. What was that date?

Q. November, 1950. In November, 1950, were you convicted In this Court of the crime of breaking and entering and larceny?

A. Yes, sir.

Q. Now, do you want to tell this jury right now that your only purpose in going with Mr. Enright was to stay in the car while he went to see his girl friend?

A. Yes, sir.

Q. And you expect this jury to believe you?

A. That is the truth, sir.

Q. Sir, just a few months ago weren't you convicted in this Court room of the crime of assault?

Mr. NIXON. Rather than keep objecting, I will object to this line of questioning as having no bearing on the evidence relating to this particular case, and it is unfair to my client in terms of his constitutional rights. May I with that statement be

understood to object to the entire line of questioning.

The COURT. Your objection and exception may be noted. I understand he is offering it on credibility.

Mr. NIXON. I understand that, Your Honor.

Q. Would you tell us what other crimes you have been convicted of, Mr. Cote?

A. Assault, drunkenness, driving without a license.

Q. By the way, you are telling us now you did not drive that car that day, is that right?

A. I did not drive that car that day.

Q. But you have been convicted of driving without a license a number of times, haven't you?

A. Yes, sir.

Q. What else, sir.

A. As I mentioned, assault and drunkenness.

Q. How about last year, leaving the scene of an accident?

A. Yes, sir.

Q. And operating without a license?

A. I just mentioned that, sir.

Q. How about wanton damage to property last year?

A. Yes, sir.

Q. How many times did you say you had been convicted of drunkenness?

The COURT. Now, would counsel please step up to the bench?

(Conference at bench).

The COURT. You might ask him about the ones you are prepared to prove and he may be telling you about something you are not prepared to prove.

Mr. BUSSIERE. I was just trying to short-cut it, but I can give the dates on these.

Mr. NIXON. My objection and exception still stands. (Further conference at bench, not reported).

Q. On May 11, 1963, were you convicted in the Manchester Municipal Court of the crime of derisive words?

A. Yes, sir, if it is written out there.

Q. On the same day were you convicted of the crime of assault?

A. The date, sir, I can't remember.

Q. Well, roughly May of 1963?

A. That is three years ago, sir. I don't remember the date.

Q. On December 8, 1962, were you convicted of the crime of driving under the influence, second offense?

A. I don't know about the date, sir. I was convicted of such a violation, yes.

Q. In July of 1962 were you convicted of the crime of assault?

A. If it is right there, sir, yes.

Q. In May of 1959 were you convicted of the crime of wanton damage to property?

A. Yes, sir.

Q. And in January, 1959 — I am sorry, strike that.

Mr. NIXON. Excuse me, At the close of this I renew my objection on the same grounds as before stated, and also on the ground that I do not have a copy of that record

and I do not know how many times the same offense may have been asked about, perhaps more than once, and I would like to ask that it be stricken from the consideration of the jury. Again, it is not fair to my client. It is not any evidence or reference to intention in this case and is unfair to this respondent under the constitution and also it is obvious that he denies nothing and is not impeached in that respect on that questioning.

The COURT. Do you wish to be heard?

Mr. BUSSIERE. No, Your Honor, it is to be used by the Jury solely on the question of credibility. That is all I argue to the Jury.

The COURT. Mr. Nixon has raised the question whether or not you brought up the same offense more than one time. Do you wish to be heard on that?

Mr. BUSSIERE. No, I will be glad to give him a copy of what I have here, if he objects.

The COURT. Objection overruled. Your exception may be noted. We will take the morning recess at this time."

In addition, the State was allowed, over objection, to have it appear that Cote had been convicted of one prior offense, driving without a license, "a number of times" (R. 163), when in fact he had been convicted of it only once in the Manchester District Court, and that conviction was "nolle prossed" on appeal to the Hillsborough County Superior Court. (See Supplementary Motion For Rehearing). The tactic was significantly prejudicial to Cote since he had no auto license on the day in question, and the only admissible evidence in the case was that Enright, not Cote, drove the car that day. (R. 12, 163). The State also unsuccessfully at-

tempted to show that some guns had been taken from the subject car, although Cote wasn't indicted for any such offense (R. 70), that Cote had previously talked to the owner of the car "about how to start cars" (without keys) (R. 79), although no claim was made by anyone that he had done so, and that the subject car had been "ransacked" (R. 155-156), although the only evidence on the subject, from one of the police officers, was that "the back of the rear seat had been pulled forward slightly". (R. 82).

Furthermore, the State also attempted to establish through the police that Cote had refused to "talk" after apprehension (R. 86-89), and after a ruling that it could not utilize this tactic, and agreeing not to do so, proceeded to press for and obtain the answer from a police witness, "No, sir, he refused to answer any questions." (R. 90-91). Not satisfied with this the State grilled Cote again on the same subject during his cross-examination, and then finally withdrew the question after repeated objection. (R. 177-178).

Other prejudice-inciting conduct by the State included cross-examining Cote about whether he had changed clothes after the breaking and before his apprehension, raising the inference that he had in fact done so, in the absence of a shred of supporting evidence (R. 158-169), and in the face of direct evidence to the contrary (R. 56, 186-187). Finally, the State in cross-examination referred to the "escapade" that Cote had been involved in that day (R. 170), and in argument alleged that Cote's defense consisted of "straws brought in to try to confuse the issue" (R. 205), and further as to any reasonable doubt of guilt being no more than "straws in the wind". (R. 206).

At the close of the evidence specific written requests for jury instructions so as to limit the prejudice to Cote arising from the disclosure of his prior offense record were submitted. (See Roger F. Cote's Requests For Instructions, Nos. 4-5). The Trial Court's complete charge on the subject however, was as follows (R. 219):

> "The fact that the State was allowed to introduce evidence as to the record of the respondent that was introduced, can be used and considered by you on the basis of credibi-

lity. That is, if this evidence causes you to reject the testimony of the respondent, that is, you do not consider it. You do not accept it. You give no weight to it. Then, of course, you do not use it in deciding the case."

The Hillsborough County Jury retired to deliberate at 3:55 P. M. on April 27, 1966. At 6:15 P. M. the Jury submitted the following question for answer by the Court:

> "If Mr. Cote saw the stolen articles in the car in the sandpit for the first time, would this knowledge be enough to convict him." (R. 225).

The Court's answer was "No, not on this indictment." (R. 225). The Jury then retired, and thereafter, at 10:40 P. M., returned a verdict of guilty.

Roger F. Cote was on May 10, 1966, sentenced to a term of not less than one nor more than three years in the New Hampshire State Prison.

HOW FEDERAL QUESTION IS PRESENTED

The federal questions sought to be reviewed were raised in the Hillsborough County Superior Court at the time of the first question to Roger F. Cote relative to his record of prior convictions, which concerned the only felony conviction in his entire record, and one that had occurred nearly 16 years prior to trial. The colloquy was as follows (R. 161-162):

"Q. Sir, on November 4, 1950, were you convicted in this Court of the crime of breaking, entering and larceny?

Mr. NIXON. My objection to any line of questioning of this nature.

The COURT. Do you wish to state the ground of your objection?

Mr. NIXON. In that it does not bear upon anything to do with this particular case, and I

submit it is a violation of my client's constitutional rights.

The COURT. For what purpose do you offer it?

Mr. BUSSIERE. Credibility, Your Honor.

The COURT. For that purpose you may proceed.

Mr. NIXON. Note my exception, please.

The COURT. Exception noted."

The prior conviction-cross-examination tactic was repeatedly objected to on constitutional grounds (R. 162, 165), as were other prejudice-inciting questions and statements by the State. (R. 163, 170, 80, 155, 86-89, 90, 91).

After trial, counsel for the Defendant on May 13, 1966, filed a Motion to set aside the guilty verdict including as grounds therefor the reason that, "3. The verdict was based in part on constitutionally inadmissible evidence." (See Roger F. Cote's Motion To Set Aside Verdict).

The constitutional issues were again raised by counsel for Roger F. Cote in his Reserved Case, filed in the Hillsborough County Superior Court on June 29, 1966.

The constitutional issues were first raised in the Supreme Court of New Hampshire in the Motion For Continuance Pending Disposition Of Cases Involving Identical Or Similar Issues Of Law In United States Supreme Court, filed in the former Court on behalf of Roger F. Cote on December 20, 1966. (Appendix C, *infra, p.* 27).

The constitutional issues composed a substantial part of the briefs and arguments on behalf of Roger F. Cote in the Supreme Court of New Hampshire. In addition to the undersigned, five other New Hampshire attorneys submitted briefs and were permitted to argue *amici curiae,* before said Court on the fair trial—due process—equal protection of the laws issues raised in this case. Pages 14-64 of the principal brief submitted on behalf of Roger F. Cote treated subdivisions of the following main topic:

"II. THE RESPONDENT'S CONSTITUTIONAL RIGHTS TO A FAIR TRIAL, DUE PROCESS, AND EQUAL PROTECTION OF THE LAWS HAVING BEEN VIOLATED BY PERMITTING HIS RECORD OF PRIOR CONVICTIONS TO BE PARADED BEFORE THE JURY DURING HIS CROSS-EXAMINATION, AND HIS CONVICTION IN THIS CASE HAVING RESULTED FROM PREJUDICE, NOT EVIDENCE, THE VERDICT MUST THEREFORE BE OVERTURNED AND A NEW TRIAL ORDERED."

Finally, in its Opinion (Appendix A, *infra, p.* 18), the Supreme Court of New Hampshire recognized that the appeal was in part grounded "on constitutionally inadmissible evidence", and further stated, at *p.* 21, *infra,* as follows:

> "Defendant argues that his constitutional rights to a fair trial, due process, and equal protection of the law have been violated by permitting his record of prior convictions to be 'paraded' before the jury and that his conviction which resulted from prejudice and not evidence should be overturned and a new trial ordered. Defendant further maintains that the rule in New Hampshire permitting 'conviction-cross-examination' of defendants is 'contrary to the intent of the enabling statute [Laws 1871, 38:1, now RSA 516:33] outmoded, and totally ineffective, in its reliance on limiting instructions, to protect respondents against undue prejudice'. *Amici curiae* supported these contentions."

REASONS FOR GRANTING THE WRIT

1. We respectfully submit that in grounding its decision in the present case upon the rationale of *Spencer* v. *Texas,* 385 U. S. 554, the Supreme Court of New Hampshire thereby added this case to the "frightful progeny of *Spencer*". *Burgett* v. *Texas,* 389 U. S. 109, 120.

An irreconcilable conflict in principle exists between the decisions in *Spencer* and *Burgett.* The conflict cannot be resolved or explained by saying that the former decision concerned only "fairness" in general, whereas the latter involved a "specific federal right", ie., the right to counsel. What was involved in *Spencer,*

and what is involved in the case at bar, are specific federal rights of equal or greater significance to the integrity of the judicial process and the administration of justice than the right to counsel. They are the right to "due process of law", as guaranteed by the Fifth Amendment, to trial "by an impartial jury" as guaranteed by the Sixth Amendment, and the right to "the equal protection of the laws", as guaranteed by the Fourteenth Amendment. If the words "due process of law" have any real meaning at all, they require a fair trial. We submit that a defendant in a state criminal case who, as in the case at bar, on taking the stand is allowed to be cross-examined at length as to his entire record of prior criminal convictions, regardless of nature, degree of severity, remoteness in time, or logical relevance to the issue of credibility, is thereby necessarily and without more denied his rights of "due process of law", a fair trial "by an impartial jury", and the "equal protection of the laws" under the Fifth and Sixth Amendments to the Constitution, as applied to state proceedings by the Fourteenth Amendment. Our stated concern for the fair trial concept, as admirably enforced in *Estes* v. *Texas,* 381 U. S. 532, and *Sheppard* v. *Maxwell,* 384 U. S. 333, doesn't really amount to much, especially in the eyes of the public, if it does not apply *inside* the courtroom as well as without.

> "Judges fret about the publication of the prior criminal records of defendants. How much does it matter as long as the law allows the defendant to be questioned about his record once he takes the stand?" Daniel, "Fair Trial And Freedom Of The Press", 71 Case And Comment, No. 5, *p.* 4 (1966).

2. It is established that the introduction of evidence of prior crimes during the direct case to show criminal disposition would violate the Due Process Clause. *Spencer* v. *Texas, supra,* at 575.

> "It is a maxim of our law, that every man is presumed to be innocent until he is proven guilty. It is characteristic of the humanity of all English speaking peoples, that you cannot blacken the character of a man who is on trial for an alleged crime. Prisoners ordinarily come before the court and jury

under manifest disadvantages. The very fact that a man is charged with a crime is sufficient to create in many minds a belief that he is guilty. It is quite inconsistent with that fairness of trial to which any man is entitled, that the jury should be prejudiced against him by any evidence except what relates to the issue; above all should it not be permitted to blacken his character, to show that he is worthless, to lighten the sense of responsibility which rests upon the jury by showing that he is not worthy of painstaking and care, and, in short, that the trial is what the chemists and anatomists call *experimentum in corpore vili.*" *State* v. *Lapage*, 57 N. H. 245, 289, 24 A. 69 (1876).

The rationale underlying the prior conviction-cross-examination tactic, however, is basically that a necessary relationship exists between the fact of a prior criminal conviction and a propensity to lie under oath. The rationale has been discredited since at least 1827. II Wigmore, *Evidence s.* 519, *p.* 610, citing Bentham, *Rationale Of Judicial Evidence, b.* IX, *pt.* III, *c.* III, (Bowring's ed. vol. VII, *pp.* 406 *ff.*) (1827). The same rationale supported the common law rule rendering convicted felons incompetent as witnesses, which was universally abolished during the mid-nineteenth century by statutes similar to Chapter 516, Section 33, Revised Statutes Annotated of New Hampshire (Appendix B, *infra, p.* 26). II Wigmore, *Evidence, supra.* The rationale is no more logical now as to the prior conviction-cross-examination tactic, than it was in 1827 as to the witness incompetency rule.

3. The prior conviction-cross-examination tactic is a source of widespread abuse and concern in the field of modern criminal procedure. Safeguards or limitations as to its use have been and are at present frequently suggested and imposed by Courts (*Gordon* v. *U. S.*, 383 F. 2d 936; *Luck* v. *U. S.*, 348 F. 2d 763), Legislatures (Kansas Laws, 1963, *c.* 303; K. S. A. 60-421; Virgin Islands Code, *s.* 835; Canal Zone Code *s.* 2825), and law revision bodies (Reports, Recommendations And Solutions, Calif. Law Revision Comm., Vol. 7, *pp.* 141-144; 9A Uniform Laws Annotated — Rule 21, Uniform Rules Of Evidence; American Law Institute, Model Code of Evidence, Rule 106, *p.* 117). The net and proven effect

of the rule which permits a defendant in a criminal case to be cross-examined as to his prior conviction record is either to prevent him from taking the stand (Kalven & Zeisel, *The American Jury, p.* 146 (1966), or if he does, to cloud the issue of innocence or guilt with the indifference, if not suspicion and hostility, that inevitably arises upon the revelation of the defendant's past bad record.

> " . . . the record is an important determinant of the defendant's decision to testify. If he has no record, he will elect not to testify in only (100-91-) 9 per cent of the cases; if he has a record this percentage rises to (100-74-) 26 per cent. Further, when the evidence is most favorable to the defendant — when the case is clear for acquittal or close — the defendant without a record testifies over 90 per cent of the time. This percentage drops, even for defendants without a record, when the case is clear for conviction. Again, when the defendant has a record and the case is clear for acquittal he elects to testify only 53 per cent of the time, suggesting that here counsel sees no reason to disturb a favorable situation by the disclosure of the record". Kalven & Zeisel, *The American Jury, supra.*

The announcement of a rule prohibiting prior conviction cross-examination of defendants in criminal cases would give meaning to the fair trial and due process guarantees of the Federal Constitution, resolve the painful dilemma that our judicial system now faces in its attempts to square a precedent-sustained procedural rule of illogic with the fair trial commands of the Constitution (e.g. *Gordon* v. *U. S., supra*), and encourage a more effective system of criminal justice, in that the principal reason for defendants' reluctance to take the witness stand would be removed.

4. The theory that "limiting instructions" are effective to protect a defendant from undue prejudice arising by disclosure of his prior criminal record can no longer be tolerated. Kalven & Zeisel, *The American Jury, supra.* Limiting instructions given in attempts to avoid undue prejudice have been described as "a device

which satifies form while it violates substance; that is, the recommendation to the jury of a mental gymnastic which is beyond, not only their own power, but anybody else's." *Nash* v. *U. S.*, 54 F. 2d 1006, 1007 (C. A. 2).

> "The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers known to be unmitigated fiction," *Krulewitch* v. *U. S.*, 336 U. S. 440, 453.

An instruction that a statement by one co-defendant as to a prior conviction of another be limited to the former has been described as "Ritualistic counsel of psychologically impossible behavior." *U. S.* v. *Jacangelo*, 281 F. 2d 574 (C. A. 3). An admittedly-careful charge by an experienced judge to the effect that a jury should erase from their minds the 25 prior convictions of a defendant when considering his guilt in the case at bar was described as calling for " . . . a feat of psychological wizardry . . . (verging) . . . on the impossible even for berobed judges." *U. S.* v. *Banmiller*, 310 F. 2d 720, *cert. den.*, 375 U. S. 828.

> "Recent jury examinations conducted by the University of Chicago indicate that jurors do not segregate evidence introduced for impeachment purposes. These tests disclosed that jurors have an almost universal inability and/or unwillingness either to understand or follow the court's instructions on the use of defendant's prior criminal record for impeachment purposes. The jurors almost universally used defendant's record to conclude that he was a bad man and hence was more likely than not guilty of the crime for which he was then standing trial;" Comment: "Other Crimes Evidence At Trial: Of Balancing And Other Matters", 70 Yale L. J. 763, 777 (1961).

CONCLUSION

The procedure rule permitting prior conviction-cross-examination of defendants in criminal cases, being historically and logically unsound, being valueless as a device for truth-ascertainment,

being an invitation to prosecutorial abuses and judicial dilemmas, and being permissive of shameful violations of the Constitutional guarantees of a fair trial, due process, an impartial jury, and the equal protection of the laws, in the name of the fiction of procedural consistency and integrity, should be struck down in its entirety. For these and the foregoing reasons, this petition for a writ of certiorari should be granted.

> "There is no right more sacred to our institutions of government than the right to a public trial by a fair and impartial jury; no wrong more grievous than its denial, and no greater duty is enjoined upon the courts than to preserve that right untarnished and undefiled." *Baker* v. *Hudspeth*, 129 F. 2d 779, 781 (C. A. 10).

Respectfully submitted,

John W. King and David L. Nixon

King, Nixon, Christy & Tessier

Attorneys for Roger F. Cote

APPENDIX A

Hillsborough,
No. 5579.

STATE v. ROGER F. COTE

Argued May 2, 1967.

Decided October 31, 1967.

Indictment for breaking, entering and larceny (RSA 583:3) of goods and chattels in the aggregate value of $238.65 from the dwelling of Ernest A. Bettez in Manhester.

Trial by jury resulted in a verdict of guilty.

The Trial Court (*Morris*, J.) reserved and transferred defendant's exceptions to the admission and exclusion of evidence; the denial of his motions to dismiss the indictment as a matter of law; the denial of his motion to set aside the verdict because, among other grounds, "the verdict was based in part on constitutionally inadmissible evidence" and "resulted from error."

George S. Pappagianis, Attorney General and *Norman E. D'Amours*, Assistant Attorney General (*Mr. D'Amours* orally), for the State.

King, Nixon, Christy & Tessier (*Mr. David L. Nixon* orally), for the defendant.

David C. Engel (by brief and orally), as amicus curiae, pro se.

Smith, Welts, Robertson & McGinnis (*Mr. Robert F. McGinnis* orally), as amicus curiae, pro se.

Anthony McManus (by brief and orally), as amicus curiae, pro se.

Leonard, Leonard & Prolman (*Mr. David M. Prolman* orally), as amicus curiae, pro se.

Clifford J. Ross (by brief and orally), as amicus curiae pro se.

LAMPRON, J. At about 7:10 A. M. on April 19, 1965, Ernest Bettez and his wife left their residence located at 150 Fieldcrest

Road in Manchaster which was then unoccupied until 12.05 P. M. when Ernest returned. Upon entering he discovered immediately that everything in the bedroom was "all upside down" and that a wall safe in a walk-in closet was gone. Also missing were $50, a Hamilton electric wrist watch, a bed spread, a bottle of wine in a box container, a bottle of whiskey and other articles. Bettez found that a window had been broken in the garage under the house which could provide entrance to the residence above it.

Robert Lemon, who then owned a 1962 blue and white Ford bearing Texas registration plates, picked up Roger Cote, the defendant, that morning and gave him a ride to a club located near the police station in Manchester. Lemon then parked his car nearby and joined his wife at the county courthouse, a short distance away, at about 10 A. M. Lemon and Cote had agreed to meet at this same club when Lemon had finished at the courthouse. When Lemon returned about 12:30 P. M. he could not find his car or Roger Cote. He testified he had not given Cote permission to use his car nor had he given Cote the keys to it but had them in his own pocket.

At about 11:30 A. M. that same morning, Daniel Boucher was driving to his home on Fieldcrest Road, a short street with five or six houses on it. He slowed his oil truck to allow a blue and white Ford with Texas plates to proceed. He saw two people in the front seat of this car which he later observed turning around on the street to proceed in the other direction, and later saw this car go by again and come to a stop but "didn't know where it was stopping."

That afternoon at about 1:30 P. M. a cab driver was called to the Cote home where he picked up the defendant and William Enright. He was directed by Cote to drive them to a sandpit where a new technical school was to be constructed. A Ford with Texas registration plates was there off the road in the sand up to its hubcaps. Cote asked the driver to pull this car out, which he was unable to do. Later that afternoon the Lemons discovered where their car was and the police were called to the scene.

In their investigation the police followed two sets of footprints

which led away from this car and discovered the Bettez safe wrapped in a bed spread taken from the Bettez home. Based on his comparison of tire marks, and a large quantity of oil found on the roadway at the Bettez home, a police officer testified that it was his opinion that the Lemon car was the vehicle which made those marks and left that oil at the Bettez residence.

Arthur Breton saw Roger Cote, the defendant, earlier that same afternoon on April 19, 1965, at a club in Manchester. Cote asked him to go to this same sandpit to pull a car out. Breton went there with his truck and found a blue and white 1962 Ford with Texas plates "bogged in sand." He did not even try to pull it out as he "felt it would be useless." On the way back Cote offered to sell Breton a Hamilton electric wrist watch which he purchased from the defendant for $15 and extinguishment of a debt of $20. This watch was later identified as the one taken from the Bettez home earlier that day.

The defendant Cote testified that some time after Lemon had left him at a club around 10 A. M. that same morning where he drank liquor, he met William Enright at a cafe where he had a bottle of beer. Enright "asked me if I had an automobile, and I said no, but I did have Mr. Lemon's car, and I says 'I don't have a license.' He says, 'I have' and requested to borrow the car to go over to the west side to see a girl friend of his . . . I went with him." The next thing Cote specifically remembered was "the engine was roaring wide open and the tires were spinning, and I could smell burned rubber and the car was rocking back and forth, and that is what woke me up." "When I started looking around I knew the place. I have lived next to the place for twenty years."

On cross-examination Cote admitted that his testimony as to the reason why Lemon would give him the key to his car, as he had testified was done, "doesn't make much sense." He testified that he bought the Hamilton electric wrist watch from Enright for $10 and within a short time thereafter sold it to Breton. He also admitted that when he was asked by the police that evening if he had ever seen that watch "I told them I had never seen it before." The credibility of the witnesses was for the jury and they

could disbelieve the exculpatory testimony given by the defendant. *State* v. *Reed*, 106 N. H. 140, 141; *Bird* v. *State*, 231 Md. 432.

On the evidence the jury could find beyond a reasonable doubt that Cote was present at the Bettez residence when the crime charged was committed; that he was closely associated with the automobile used to commit the crime, both before and after its commission; that he was in possession of a stolen article shortly after the crime was committed; that he was a perpetrator of the burglary at the Bettez residence. *State* v. *Enright*, 108 N. H. *State* v. *Rumney* 108 N. H. 40; *State* v. *Amero*, 106 N. H. 134; See *State* v. *Santos*, 107 N. H. 490. Defendant's motions based on the insufficiency of the evidence to sustain a verdict that he was guilty of the crime charged in the indictment were properly denied and his exceptions thereto are overruled.

During the cross-examination of the defendant, the State was allowed, over objection, to ask him, limited to his credibility as a witness, about his conviction on November 4, 1950 of the crime of breaking, entering and larceny. He was also cross-examined for the same purpose, again over objection, about his convictions for assault, drunkenness, leaving the scene of an accident, driving without a license "a number of times," wanton damage to property, and "derisive words."

Defendant argues that his constitutional rights to a fair trial, due process, and equal protection of the law have been violated by permitting his record of prior convictions to be "paraded" before the jury and that his conviction which resulted from prejudice and not evidence should be overturned and a new trial ordered. Defendant further maintains that the rule in New Hampshire permitting "conviction — cross-examination" of defendants is "contrary to the intent of the enabling statute [Laws 1871, 38:1, now RSA 516:33] outmoded, and totally ineffective, in its reliance on limiting instructions to protect respondents against undue prejudice." *Amici curiae* supported these contentions.

The law is well established in this State and elsewhere that evidence of prior convictions of crime is inadmissible at a criminal trial either to establish guilt or to show that a defendant would be likely to commit the crime with which he is charged.

State v. *Travis*, 82 N. H. 220; *Lane* v. *Warden, Maryland Penitentiary*, 320 F. 2d 179, 181 (4th Cir. 1963); *Whitty* v. *State*, 149 N. W. 2d 557, 563 (Wis. 1967); *People* v. *Kelley*, 424 P. 2d 947, 953 (Cal. 1967). The main reason for such exclusion is the potentiality for prejudice of such evidence, the possibility that the generality of the jury's verdict might mask a finding of guilt based on an accused's past crimes. *Spencer* v. *Texas*, 385 U. S. 554, 560.

However, evidence of prior crimes committed by the defendant is admitted when "it is particularly probative in showing such things as intent . . . an element in the crime . . . identity . . . malice . . . motive . . . a system of criminal activity . . . or when the defendant has raised the issue of his character . . . or when the defendant has testified and the State seeks to impeach his credibility . . . .

"In all these situations . . . the jury learns of prior crimes committed by the defendant, but the conceded possibility of prejudice is believed to be outweighed by the validity of the State's purpose in permitting introduction of the evidence. The dedefendants' are protected by limiting instructions . . . and by the discretion residing with the trial judge to limit or forbid the admission of particularly prejudicial evidence even though admissible under an accepted rule of evidence." *Spencer* v. *Texas*, 385 U. S. 554, 561.

Prior to July 13, 1871, when the predecessor of RSA 516:33 was adopted (Laws 1871, 38:1), it was held in New Hampshire in accordance with the prevailing common law that a person convicted of an infamous crime was incapacitated from being a witness on the ground that his conviction was such an impeachment and condemnation of his general character for truth that he was rendered incompetent to testify. *State* v. *Archer*, 54 N. H. 465, 467. RSA 516:33 reads as follows: "No person shall be incompetent to testify on account of his having been convicted of an infamous crime, but the record of such conviction may be used to affect his credibility as a witness." Its main purpose was to remove the disibility of such convicted person to be a witness. 2 Wig., Evidence (3d *ed*) *s.* 524, *p.* 617. It is unnesessary to inter-

pret that part of the statute dealing with the use of the record of conviction to affect the credibility of such a witness as we are dealing in this case with impeachment of the witness by cross-examination as to revelent matters which tend to discredit him, including prior convictions of crimes. 58 Am. Jur., Witnesses, *ss.* 687, 743, *pp.* 373, 397; 42 B. U. L. Rev. 91, 95.

This court in *State* v. *Duke,* 100 N. H. 292 (decided in 1956) made the following statements at pages 293, 294 pertaining to this type of attack on the credibility of the defendant as a witness:

"We are aware of the arguments for a rule which would limit impeachment in such cases to crimes directly involving lack of veracity. See 89 U. Pa. L. Rev. 166; Am. Law Inst., Model Code of Evidence, Rule 106 (1) (b); *Id.,* 341 [also Rule 21, 9a U. L. A. *pp.* 607, 608]. It seems to us that such a rule represents too narrow and artificial a view. The object of a trial is not solely to surround an accused with legal safeguards but also to discover the truth. What a person is often determines whether he should be believed. When a defendant voluntarily testifies in a criminal case he asks the jury to accept his word. No sufficient reason appears why the jury should not be informed what sort of person is asking them to take his word. In transactions of everyday life this is probably the first thing that they would wish to know . . . . Lack of trustworthiness may be evinced by his abiding and repeated contempt for laws which he is legally and morally bound to obey . . . through the violations are not concerned solely with crimes involving 'dishonesty and false statements.' *Cf.* American Law Institute, *supra,* 341. Such evidence may well have more probative value as bearing on credibility than a conviction of a single felony committed in a moment of weakness or passion, though the admissibility of such convictions is clearly established. See *State* v. *Mihoy,* 98 N. H. 38, 40, 41, and authorities cited; see also, RSA 516:33."

Under this practice, which has existed in this State for many years (42 B. U. L. Rev. 91, 95), the defendant is put to the same credibility test as any other witness. See *State* v. *Ober,* 52 N. H. 459, 463. The defendant "has the choice, after weighing the advantage of the privilege against self-incrimination against the advantage of putting forward his version of the facts and his

reliability as a witness, not to testify at all. He cannot reasonably claim that the Fifth Amendment gives him not only this choice but, if he elects to testify, an immunity from cross-examination on the matters he has himself put in dispute. It would make of the Fifth Amendment not only a humane safeguard against judicially coerced self-disclosure but a positive invitation to mutilate the truth a party offers to tell." *Brown* v. *United States*, 356 U. S. 148, 155, 156; *State* v. *Ober, supra; United States* v. *Pate*, 357 F. 2d 911, 915 (7th Cir. 1966; *State* v. *Robideau*, 425 P. 2d 880, 882, 883 (Wash. 1967). Nor does our procedure allowing cross-examination of a defendant as to prior convictions of crime to impeach his credibility as a witness deny him the fundamental fairness or the equal protection of the laws guaranteed by the Fourteenth Amendment of the Federal Constitution. *Spencer* v. *Texas*, 385 U. S. 554, 564, 565; *United States* v. *Pate, supra.* Such a procedure does not violate our State Constitution. *State* v. *Fogg*, 80 N. H. 533, 535.

Such cross-examination of a defendant must always be under the close control of the Trial Court in the exercise of its discretionary powers. *State* v. *Duke*, 100 N. H. 292, 294. In exercising this supervision the Trial Court should bear in mind that the use of prior convictions to show nothing more than a disposition to commit crime, or the crime currently charged, would violate the Due Process Clause of the Fourteenth Amendment. *Michelson* v. *United States*, 335 U. S. 469, 475-476. It should also consider the fact that prior convictions have an inherent prejudicial effect and are admitted to impeach the defendant's credibility only because the possibility of prejudice resulting from their introduction in evidence is thought to be outweighed by the legitimate purpose served by it. *Spencer* v. *Texas*, 385 U. S. 554, 562. See *Luck* v. *United States*, 348 F. 2d 763, 767, (D. C. Cir. 1965). The Trial Court must instruct the jury at the time such evidence is admitted and in the final instructions that it is to be used only to evaluate the credibility of the defendant as a witness and is not to be considered as proof of his guilt of the offense being tried. *State* v. *Mihoy*, 98 N. H. 38, 40, 41.

Futhermore care must be taken by the Trial Court that the cross-examination relating to prior convictions is not conducted

in such a manner as to cause undue prejudice to the defendant. The Court should not permit questions pertaining to matters which "seem unduly prejudicial, or too trifling or remote in time to have a real bearing on credibility." *State* v. *Duke*, 100 N. H. 292, 294. Questions about prior convictions so linked with other questions by the cross-examiner as to suggest to the jury that those convictions are an indication that the defendant is guilty of the crime being tried should be excluded, as should questions making undue reference by repetition or otherwise to the prior convictions of the defendant. See *Commonwealth* v. *Davis*, 396 Pa. 158, 162, 163.

State v. *Duke*, 100 N. H. 292 has been re-examined in the light of subsequent State and Federal decisions and other sources. *Spencer* v. *Texas*, 385 U. S. 554; *State* v. *Robideau*, 425 P. 2d 880 (Wash. 1967); *United States* v. *Pate*, 357 F. 2d 911 (7th Cir. 1966); 19 Okla L. Rev. 430 (1966); 34 Fordham L. Rev. 107, 111, 119 (1965); 78 Harv. L. Rev. 426, 440, 441. We affirm the holding in *State* v. *Duke*, *supra*. However, to aid the Trial Court in carrying out the principles therein enunciated we have deemed it proper to elaborate on certain considerations and procedures to be followed by the Court in this area of cross-examination as to prior convictions of crime to impeach the credibility of the defendant in a criminal case as a witness.

Exceptions overruled.

All concurred.

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

In case of No. 5579 *State* v. *Cote* the court upon October 31, 1967, made the following order: Exceptions overruled.
Concord, October 31, 1967

By order of the Court:
GEORGE O. SHOVAN,
Clerk.

APPENDIX B

Revised Statutes Annotated of New Hampshire,

Chapter 516, Section 33

516:33 Felons. No person shall be incompetent to testify on account of his having been convicted of an infamous crime, but the record of such conviction may be used to affect his credit as a witness.

APPENDIX C

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS DECEMBER SESSION, 1966

SUPREME COURT

No. 5579

State

v.

Roger F. Cote

MOTION FOR CONTINUANCE PENDING DISPOSITION OF CASES INVOLVING IDENTICAL OR SIMILAR ISSUES OF LAW IN THE UNITED STATES SUPREME COURT

NOW COMES the defendant in the above-captioned matter, and respectfully says as follows:

1. This matter involves an appeal from a conviction of the defendant of charges of breaking, entering, and larceny at the April Term, 1966, of the Hillsborough County Superior Court.

2. One of the issues involved in said appeal concerns the question whether the defendant's constitutional rights were violated in that evidence of prior convictions was allowed to be introduced into evidence over his objection, specifically evidence of prior convictions of breaking, entering and larceny, and other felonies.

3. According to the November 29, 1966, issue of the advance sheets, United States Supreme Court Reports, Lawyers' Edition, Vol. 17, Lawyers' Edition 2nd, no. 1, the following cases have been granted certiorari in the United States Supreme Court:

1) Docket No. 70, Reed v. Beto, 343 Federal 2d 723 (CA 5, Texas, 1965).

In this case a petition for habeas corpus was held properly denied by the Fifth Circuit Court of Appeals, where the petitioner contended that he was deprived of a fair trial in state court, by the reading to the jury of the indictment alleging prior felony convictions, and by the presentation of proof thereon.

2) Docket No. 6 Howard v. Texas, 387, S. W. 2nd 387 (Texas Criminal Appeals, 1965).

In this case, as to which a petition for certiorari was filed May 10, 1965, a conviction of unlawfully carrying a pistol was affiremd over the accuseds contention that he was deprived of a fair trial by the state's allegation and proof of previous convictions for the purpose of enchancing the punishment.

3) Docket No. 68, Spencer v. Texas, 389 S. W. 2nd 304 (Texas Criminal Appeals, 1965).

In this case, as to which the appeal was filed June 10, 1965, a murder conviction was affirmed over the accused's contention that after he stipulated his prior conviction, due process of law denied him when the indictment referring to a prior conviction was read and evidence of the prior conviction was admitted.

WHEREFORE, in the belief that the decisions by the United States Supreme Court in one or more of the above-cited cases, will be determinative, or at lease persuasive, on the issue of the constitutionality of the defendant's conviction in the present

matter, the defendant respectfully moves that the date for filing briefs, and the date for oral argument, in this case be postponed until the United States Supreme Court has rendered decisions in said cases now pending before it.

Respectfully submitted,

ROGER F. COTE

By KING, NIXON & CHRISTY

By DAVID L. NIXON
His Attorney

CERTIFICATE

I hereby certify that a copy of the above motion was mailed to William J. O'Neil, Esq., Assistant Attorney General, on December 20, 1966.

DAVID L. NIXON

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

In case of No. 5579 *State* v. *Roger F. Cote* the court upon January 3, 1967, made the following order:

> Defendant's motion for continuance pending disposition of cases in United States Supreme Court denied.

Concord, January 3, 1967, copies to

Norman E. D'Amours, Esq.
Asst. Atty, Gen.

Emile R. Bussiere, Esq.
Co. Atty.

David L. Nixon, Esq.

By order of the Court:
GEORGE O. SHOVAN,
Clerk.